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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO ACOSTA, Defendant and Appellant.	B207106 (Los Angeles County Super. Ct. No. BA321919)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed as modified.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Francisco Acosta of, among other things, carjacking and robbery. During jury selection, the prosecutor exercised his first three peremptory challenges to jurors whom the defense described as Hispanics. The defense made a *Wheeler/Batson* motion.[1] Finding no prima facie case that the prosecutor was excluding jurors on the basis of race, the trial court denied the motion. Defendant now appeals, contending that the trial court erred in not finding a prima facie case of discrimination. He also contends that the sentence on the robbery count should have been stayed under Penal Code section 654.[2] We hold that the trial court properly denied the *Wheeler/Batson* motion, but that the sentence on the robbery count should have been stayed. We therefore modify the sentence, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

Jose Cuevas parked his car after returning home on April 28, 2007. Defendant approached Cuevas and asked for a ride. Because he didn't know defendant, Cuevas refused. Defendant pulled out a gun and told Cuevas to give him his keys and his cell phone. Cuevas dropped his keys, and defendant picked them up. Defendant told Cuevas to take a good look at him and not to call the cops. Defendant then left in Cuevas's car. Defendant was wearing a white T-shirt, jeans, a backpack and yellow sunglasses.

By happenstance, Detective James Toma was conducting an unrelated surveillance nearby and witnessed these events. The detective and his fellow officers followed defendant and found Cuevas's car parked on the street. They arrested defendant after he exited a building.

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

[2] All further undesignated statutory references are to the Penal Code.

Detective Toma brought Cuevas to a field show-up that included defendant. Cuevas was unable to identify anyone at first, but after defendant took off a hat he was wearing, Cuevas identified him as his assailant. Cuevas's cell phone was also recovered from defendant. A handgun in a backpack was in defendant's home.

II. Procedural background.

Trial was by jury. On March 4, 2008, the jury found defendant guilty of count 1, carjacking (§ 215, subd. (a)) and found true gun allegations (§§ 1203.06, subd. (a)(1), 12022.53, subd. (b)); count 2, second degree robbery (§ 211) and found true gun allegations (§§ 1203.06, subd. (a)(1), 12022.53, subd. (b)); count 3, dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) and found true gun allegations (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)) and the allegation that defendant acted maliciously and, directly or indirectly, used force or threatened to use force on the victim to obtain money or something of value; and of count 4, assault with a firearm (§ 245, subd. (a)(2)) and found true gun allegations (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)).

On April 1, 2008, the trial court sentenced defendant to the high term of nine years on count 1 plus 10 years under section 12022.53, subdivision (b). The trial court sentenced defendant to concurrent 15-year term on count 2 and a concurrent 14-year term on count 3. The court imposed but stayed the sentence on count 4 under section 654.

DISCUSSION

I. The *Wheeler/Batson* motion was properly denied.

After the prosecutor used his first three peremptory challenges to remove three Hispanic prospective jurors from the panel, defendant made a motion under *Wheeler/Batson*. The trial court denied the motion, finding that a prima facie case of discrimination had not been made. We find no error in the court's ruling.

A. *Additional facts.*

Jury selection began on February 26, 2008. The trial court empanelled 18 jurors, who were given a 22-question questionnaire. The court and counsel voir dired the panel. The prosecutor exercised its first peremptory challenge to Juror No. 13 (G-3523), its

second to Juror No. 14 (A-3098), and its third to Juror No. 16 (L-9750). Defense counsel asked for a side bar:

"[Defense counsel]: Your Honor, it would appear that the D.A. is exercising three challenges that it appeared to be of individuals that are of Hispanic background. The defendant is Hispanic. [¶] It would appear also from the panel that there were only a very limited number of minorities. I think there has been one Black in the initial panel and I would think no more than five or maybe 10 Hispanics. [¶] The D.A.'s challenges are with regard to Hispanics, and I think that he's making his selections based on racial background.

"The court: You know, I looked around the courtroom and tried to count the number that I believe are Hispanic[s], and there are so many Hispanic potential jurors in this courtroom, both in the jury box and in the audience, I think, to me–and I'm just going by looks and I don't know if you should always do that. [¶] But by [the] look, I would say well over 50 percent of the jurors in the courtroom appear to be of Hispanic background. [¶] I'm not willing to make a finding at this point that the People are excluding solely on the basis of race, so the *Wheeler* motion, I take it, at this time is respectfully denied."

B. *A prima facie case of discrimination was not established.*

Defendant contends that the trial court erred in not finding a prima facie showing of group bias. We disagree.

The state and federal Constitutions prohibit using peremptory challenges to remove prospective jurors based solely on group bias, including race. (*Batson, supra,* 476 U.S. at p. 89; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) Our United States Supreme Court has recently "reaffirmed that *Batson* states the procedure and standard to be employed by trial courts when challenges such as defendant's are made. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the

strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' " (*People v. Cornwell* (2005) 37 Cal.4th 50, 66-67, quoting *Johnson v. California, supra,* 545 U.S. at p. 168, fn. omitted.)[3]

" '[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' " (*People v. Cornwell, supra,* 37 Cal.4th at p. 67, quoting *Johnson v. California, supra,* 545 U.S. at p. 170.) An inference is a logical conclusion reached based on a set of facts. (*People v. Lancaster* (2007) 41 Cal.4th 50, 74.) " 'When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling. [Citations.] We will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 135; see also *Lancaster,* at p. 74 [we review the "voir dire of the challenged jurors to determine whether the totality of the relevant facts supports an inference of discrimination"].)

If a prima facie case is made, and the State offers a race-neutral justification for the challenges, then " 'the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .' [Citation.]" ' [Citation.] '[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.' [Citation.] Inquiry by the trial court is not even required.

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[3] *Cornwell* was disapproved on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.

[Citation.] 'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' [Citation.] A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection. [Citation.]" (*People v. Guerra, supra,* 37 Cal.4th at pp. 1100-1101.)

Citing *People v. Bell* (2007) 40 Cal.4th 582, defendant here argues that the trial court failed to meaningfully analyze whether he established a prima facie case of discrimination. *Bell* counsels that proof of a prima facie case may be made from any information in the record available to the trial court. (*Id.* at p. 597.) Certain types of evidence are relevant for this purpose, including, the prosecutor has " 'struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group' " or " 'the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole.' " (*Ibid.*) The defendant may also show that the prosecutor engaged in desultory voir dire of the challenged jurors and that the defendant is a member of the excluded group. (*Ibid*.)

Defendant complains that the trial court did not consider whether the prosecutor used a disproportionate number of his peremptories against Hispanics. He states that the prosecutor used "100 percent" of his peremptories against Hispanics. That is true, in a very misleading sense. In fact, the prosecutor exercised his *first three* peremptory challenges to Hispanics. He therefore exercised "100 percent" of his first three peremptory challenges to Hispanics. But that is hardly meaningful either by itself or when placed in context. That context is, as the court below noted, that "well over 50 percent of the jurors in the courtroom" appeared to be of Hispanic background.[4] Indeed, defense counsel appeared to agree with this estimate. He similarly noted that there were

[4] Defendant criticizes the trial court's "hip-pocket observation that it 'looked like' " over half of the prospective jurors were Hispanic. The same charge, however, could be leveled at defense counsel, who also went by mere appearance in making his *Wheeler/Batson* challenge.

five-to-ten Hispanics on the initial panel. If we assume that counsel was referring to the initial panel of 18 prospective jurors, then counsel estimated that perhaps more than half of them were Hispanics.

If 50 percent of prospective jurors were Hispanics, it can hardly be said that the prosecutor's exercise of his first three peremptories to Hispanic jurors was somehow "disproportionate" to the number of Hispanics on the panel or related to the fact that defendant is Hispanic. Rather, no conclusion can be drawn from this fact. For example, in *Bell*, the prosecutor challenged two of three African-American female prospective jurors and two Filipino-American prospective jurors. (*People v. Bell, supra*, 40 Cal.4th at pp. 594-595, 597, 599.) As to the African-American prospective jurors, the court said that the "small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*Id.* at p. 598.) As to the Filipino-American prospective jurors, the court noted, for example, that the record failed to show how many other Filipino Americans were in the venire and not challenged by the prosecutor, nor was the prosecutor's voir dire of these prospective jurors unusually desultory. (*Id.* at p. 599.)

Defendant attempts to distinguish *Bell* by analyzing the voir dire of Jurors Nos. 13, 14 and 16. In response to the questionnaire handed out by the court, Juror No. 13 said she lived in Pasadena, was single, had never been on jury duty before and was an accounting student. She had no "yes" answers to the questionnaire. She said she could be fair to both sides. Juror No. 14 lived in East Los Angeles, was single with two children, and was then unemployed but he did "general warehouse" work. He had served on a "similar case," but it was dismissed. His former sister-in-law worked for the police and two other relatives were in law enforcement in Atlanta, Georgia. Nothing about his former sister-in-law or relatives would influence him, and he could treat a police officer witness the same as a civilian witness. Juror No. 16 described herself as a married housewife with three children. She lived in Lynwood and her husband worked in a refinery "on the computer." She had no jury duty experience and she had no "yes" answers to the questionnaire. She said she could be a fair juror to both sides.

After the trial court finished questioning the prospective jurors, defense counsel had the next opportunity to voir dire them. The prosecutor then had the opportunity to voir dire the panel. He said he didn't have many questions because the court and defense counsel had done a good job. Indeed, the prosecutor did not, defendant points out, directly ask questions of Jurors Nos. 13, 14 and 16. But that is unremarkable. The prosecutor also did not ask questions of Jurors Nos. 2, 3, 4, 6, 9, 11, 12 and 18; hence, the prosecutor not directly voir dire over half of the 18-person panel. Although the prosecutor did directly voir dire Jurors Nos. 1, 5, 7, 8, 10, 15 and 17, he did so primarily to get information he had missed during prior voir dire. For example, he asked Jurors Nos. 5, 7, 10, 15 and 17 to clarify what they and/or their spouses did for a living. The prosecutor's voir dire thus comprises less than six pages of the reporter's transcript. Given this context, there is no evidence that the prosecutor deliberately and for a discriminatory purpose engaged in "desultory" voir dire of Jurors Nos. 13, 14 and 16 because they were Hispanics.

Defendant also asks us to do a comparative analysis, under *Miller-El v. Dretke* (2005) 545 U.S. 231, of Jurors Nos. 13, 14 and 16 to other jurors who were not challenged. Our California Supreme Court, however, counsels against engaging in such an analysis where, as here, the issue on appeal involves a first-stage *Wheeler/Batson* case. (*People v. Bell, supra,* 40 Cal.4th at pp. 600-601.) *Bell* explains that a comparative juror analysis makes little sense where in "determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison. Comparative juror analysis would be formless and unbounded." (*Ibid*.) We therefore will not engage in a comparative juror analysis on appeal.

II. The sentence on count 2 for robbery should have been stayed under section 654.

The jury convicted defendant of carjacking (count 1) and of robbery (count 2). The trial court sentenced defendant to a total of 19 years on count 1 and to a concurrent 15-year term on count 2. Defendant contends, the People concede and we agree, that the sentence on count 2 should have been stayed under section 654.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 therefore " 'precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. "Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." [Citations.] "[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." [Citation.]' [Citation.]" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129; see also *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) We review the trial court's findings for substantial evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

In connection with his argument that section 654 requires his sentence on count 2 for robbery to be stayed, defendant relies on, among others, *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*), disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228. *Ortega* primarily concerns the application of section 954.[5] In *Ortega*, four defendants blocked a van being driven by Jose Rubio, who was accompanied by a passenger. A defendant took Rubio's wallet and pager, and a sweater was taken from the passenger. Two of the defendants got into Rubio's van and drove away. (*Ortega, supra,*

[5] Section 954 states that an accusatory pleading may charge different statements of the same offense and defendant may be convicted of any number of the charged offenses. The exception to section 954 is multiple convictions may not be based on necessarily included offenses. (*Ortega, supra,* 19 Cal.4th at p. 692.)

at pp. 690-691.) A jury convicted defendants of two counts of robbery, two counts of carjacking, and one count of grand theft of a vehicle. (*Id.* at p. 691.) In connection with its discussion whether the defendants could properly be convicted of both robbery and theft under section 954, the court observed that " '[w]hen a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals,' " and therefore "the property taken in the robbery of Rubio . . . included the van." (*Id.* at p. 699.) The court went on to note that while a defendant may be convicted of both carjacking and robbery (in contrast to robbery and theft), section 215, subdivision (c), precludes a defendant from being *punished* for both offenses where they are based on the same conduct. (*Id.* at p. 700.)

Although that statement was made in connection with section 954, it suggests that the conclusion would be similar under a section 654 analysis. Here, the carjacking and robbery were based on the same indivisible course of conduct. Defendant approached Cuevas and asked for a ride. When Cuevas refused to give defendant a ride, defendant took Cuevas's car keys, as well as his cell phone. Defendant drove away in Cuevas's car. On these facts, defendant stole multiple items from a single victim during a single incident of criminal conduct. Notwithstanding defendant's taking of Cuevas's cell phone, the facts show that defendant's intent and objective was to take the car. Taking the cell phone was incidental to taking the car keys and the car. Therefore, the sentence on count 2 should be stayed under section 654.

DISPOSITION

The abstract of judgment is ordered to reflect that the sentence imposed on count 2 for robbery is stayed under section 654. The clerk of the superior court is directed to correct the abstract of judgment and to forward the corrected abstract of judgment to the Department of Corrections. The judgment is affirmed as modified.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.